Filed 6/1/10 P. v. McDonough CA3

**NOT TO BE PUBLISHED**



**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**THIRD APPELLATE DISTRICT**

**(Nevada)**

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>CLIFFORD KEITH McDONOUGH,<br>Defendant and Appellant. | C060726<br>(Super. Ct. No. SF07-431) |

A jury convicted defendant Clifford Keith McDonough of second degree murder of Donald Sullivan, corporal injury with great bodily injury to Cindy McDonough, and misdemeanor battery of Peter Walsh. (Pen. Code, §§ 187; 273.5, subd. (a); 12022.7, subd. (e), 242.)[1]

On appeal, defendant contends: (1) the trial court erred in failing to instruct on involuntary manslaughter; (2) the trial court denied him due process by instructing that voluntary intoxication cannot negate implied malice; (3) his trial counsel ineffectively failed to object to the prosecutor's closing

[1] Undesignated statutory references are to the Penal Code.

argument that improperly defined voluntary manslaughter; and (4) the great bodily injury finding was not supported by substantial evidence.

We do not find any prejudicial error, individually or cumulatively. Consequently, we shall affirm the judgment.

## FACTUAL AND PROCEDURAL BACKGROUND

Defendant and Cindy McDonough married in 2005, but separated about a year later at Cindy's insistence.[2] After separating, defendant and Cindy had sexual relations on rare occasion. In November 2006, Cindy filed for divorce.

In August 2007, Cindy met Donald Sullivan, her neighbor. They became friends, and later, more than that.

On October 22, 2007, the day of the incident at issue, defendant visited Cindy and asked about getting back together (the two were still technically married at this point). Cindy declined defendant's overture.

Defendant asked Cindy if she had slept with Sullivan. Cindy untruthfully replied "no," but noted that Sullivan "cared for [her] a lot." This angered defendant and he said he "wanted to kick someone's ass."

Defendant then asked Cindy for a ride home. After going to get her shoes, she returned to find that defendant had "disappeared."

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[2] Since defendant and Cindy McDonough share the same last name, for clarity we will refer to Cindy McDonough as "Cindy."

Cindy went to Sullivan's to get her cell phone so she could call defendant. Defendant, Sullivan, and Sullivan's friend, Peter "Zach" Walsh, were there. Defendant told Cindy to give him "a f[uck]ing minute." Cindy went outside. After not hearing any arguing or fighting, she returned home.

Walsh testified that an angry defendant accused Sullivan of sleeping with Cindy, whom defendant referred to as his "ex-wife." Sullivan calmly denied the accusation, but defendant continued on, threatening both Sullivan and Walsh.

After about a half-hour of varying tirades, defendant calmed down. He and Sullivan shook hands, and decided to have a drink together. After a shot or two of Scotch, defendant and Sullivan began to "play wrestle" on the floor. Both men were "smiling and laughing."

At this point, Walsh left and walked to another neighbor's house, smoking a cigarette while outside there. When Walsh returned to Sullivan's and approached his front door, defendant charged out, kicking the door open. Shirtless and clenching his fist, defendant said to Walsh, "You want some of this? You want some of this? I just beat the holy crap out of [Sullivan]. You want some of this?" Looking past defendant, Walsh saw Sullivan lying on the floor and said: "Oh, my God. What have you done?" Walsh started to walk inside to help Sullivan, but defendant spun him around and punched him in the nose. Defendant landed two more blows, knocking Walsh onto a sofa.

From his position on the sofa, Walsh could see Sullivan, whose face was "blown up" at least twice its normal size, and who was "gasping" or "gurgling" for breath while lying motionless.

Defendant turned his attention back to Sullivan, screaming, "And for you, you son of a bitch, I told you to stay away from my wife." Then, lifting his foot as high as he could, defendant stomped on Sullivan's face at least three or four times. Again, Sullivan did not move.

During the stomping, Walsh fled and summoned aid.

In the meantime, defendant, "very drunk" and "very angry," appeared at Cindy's, demanding a ride home. He was "yelling and screaming" that Sullivan had told him that Cindy and Sullivan had "slept" together. Defendant then hit Cindy about six times in the face, kicked her in the stomach, ribs and legs, and began choking her, demanding to "know why" she had "slept" with Sullivan. Cindy escaped to a neighbor's.

Another neighbor went to check on Sullivan and saw him lying on his back, his face so bloody as to be almost unrecognizable. Sullivan's only movements were involuntary twitchings and he was gurgling for air. Sullivan stopped breathing and subsequently died at the hospital after being stabilized initially.

Defendant was apprehended in the area that evening after a short pursuit. He was taken to a hospital's emergency room,

where the nurse noted he appeared intoxicated; he was treated for minor injuries arising out of the incident (a small, superficial laceration on his head and a tender jaw).

An autopsy and an imaging study disclosed that Sullivan had a fractured eye socket, nose, and hyoid bone (high in the neck); two fractures of the lower jawbone; at least 10 rib fractures; and three vertebral fractures. Some of these injuries, especially to the thick lower jawbone, the ribs, and the vertebrae, required a "significant amount of force." This considerable force also caused a "severe brain injury." The cause of death was multiple blunt force trauma.

Sullivan's blood contained methamphetamine and alcohol.

Defendant testified that Sullivan informed him that he was "sleeping with Cindy" and that defendant should "just leave town." Defendant then agreed to (the larger) Sullivan's request to have some drinks.

Later, defendant remarked nastily to Sullivan "about what kind of a man shakes a man's hand and then sleeps with his wife." Sullivan pushed defendant, defendant returned the favor, and then Sullivan decked defendant. Defendant proceeded to punch and knee Sullivan in the face five times, and left.

Defendant also testified that he hit Sullivan only because Sullivan had hit him first; the issue of Sullivan sleeping with Cindy had "[a]lready been resolved." To defendant's knowledge,

Sullivan was the fourth man with whom Cindy had been intimate during their separation.

Defendant presented evidence that Sullivan, while drinking, had been violent with two women he had dated; and also evidence of the correlation between alcohol, methamphetamine use and violent behavior.

Defendant was sentenced to an aggregate term of 21 years to life in state prison, with a six-month sentence on the misdemeanor battery conviction to run concurrently.

## DISCUSSION

### I. The Trial Court Did Not Err by Failing to Instruct on Involuntary Manslaughter

Defendant contends the trial court erroneously failed to instruct, on its own initiative, on involuntary manslaughter as a lesser included offense to second degree murder. We disagree.

The trial court instructed the jury on the crimes of second degree murder (express or implied malice), heat-of-passion voluntary manslaughter, and imperfect self-defense voluntary manslaughter.

A trial court must instruct on its own initiative on a lesser included offense, such as involuntary manslaughter here, if the evidence of that offense is "'substantial enough to merit consideration'" by the jury. (*People v. Breverman* (1998) 19 Cal.4th 142, 162.)

Involuntary manslaughter is defined as an unlawful killing without malice aforethought "in the commission of an *unlawful*

*act*, not amounting to [a] felony; *or* in the commission of a *lawful act* which might produce death, in an unlawful manner, or without due caution and circumspection." (§ 192, subd. (b), italics added.)

Defendant claims there is substantial evidence that he killed Sullivan "in the commission of an unlawful act, not amounting to [a] felony," i.e., a misdemeanor battery. We think not.

As the People persuasively observe, "[t]he evidence conclusively showed that [defendant] beat Sullivan with his fists, if not also his feet, and that the beating was so severe that Sullivan suffered multiple bone fractures, not to mention a severe brain injury. No reasonable jury could have found that [defendant] committed merely a misdemeanor battery in administering such a savage beating upon Sullivan. Accordingly, the trial court did not have a sua sponte duty [i.e., a duty on its own initiative] to instruct the jury on involuntary manslaughter." (See *People v. Cook* (2006) 39 Cal.4th 566, 596-597 (*Cook*); see also 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, § 15, p. 647; CALCRIM No. 960 [defining misdemeanor battery as including "[t]he slightest touching . . . if it is done in a rude or angry way[;] [m]aking contact with another person, including through his or her clothing, is enough."].)

Defendant disagrees. He points to long-standing case law indicating that involuntary manslaughter, rather than murder, is

generally the proper verdict when a defendant unlawfully kills during a fistfight. (*People v. Munn* (1884) 65 Cal. 211, 212-214 (*Munn*); *People v. Spring* (1984) 153 Cal.App.3d 1199, 1204-1207 (*Spring*).)

At the *Munn-Spring* pace of decision, we may not get definitive word until the year 2084, but in the meantime, those two decisions support the trial court rather than defendant.

The *Munn* and *Spring* decisions draw a distinction between an ordinary fistfight that extraordinarily led to death, and a savage beating with fists that unremarkably resulted in death. In the ordinary fistfight context, involuntary manslaughter is a viable theory. In the savage beating context, it is not.

For example, in *Munn*, "the blow happened by chance to fall upon that portion of the skull which is the thinnest and most easily fractured." (*Munn*, *supra*, 65 Cal. at p. 214.) *Munn* concluded: "[I]f the blows causing death are inflicted with the fist, and there are no aggravating circumstances, the law will not raise the implication of malice aforethought, which must exist to make the crime murder." (*Id.* at p. 213.) Here, there were aggravating circumstances--defendant savagely beat Sullivan to death.

In *Spring*, *supra*, 153 Cal.App.3d 1199, the defendant's assault "consisted of but a single punch" that "was not even of sufficient force to knock down" the "elderly" victim "or cause more than slight outward damage" (*id.* at p. 1206); an on-scene call for paramedics was cancelled, but a week later the victim

collapsed and, 17 days after the punch, the victim died from a subdural hematoma (*id.* at p. 1203).

This distinction was also noted in a recent decision from our state Supreme Court, *Cook*, *supra*, 39 Cal.4th 566, which said: "Defendant did not simply start a fistfight in which an unlucky blow resulted in the victim's death. He savagely beat [the victim] to death [with a board, and this could not be deemed a mere misdemeanor battery for involuntary manslaughter purposes]." (*Id.* at p. 597; see *id.* at p. 596.) Again, the evidence here is that defendant savagely beat Sullivan to death.

Finally, defendant claims that his position finds "solid support" in *People v. Glenn* (1991) 229 Cal.App.3d 1461 (*Glenn*). We disagree.

*Glenn* found that the trial court there erred prejudicially in refusing the defendant's request to instruct on involuntary manslaughter. (*Glenn*, *supra*, 229 Cal.App.3d at pp. 1465, 1467.) The defendant in *Glenn* provided two versions of how he had stabbed another to death, both of which showed no intent to kill: One version showed criminal negligence; the other showed imperfect self-defense. (*Id.* at p. 1467; see *id.* at pp. 1465-1466.)

However, the involuntary manslaughter theory of criminal negligence is based on the "lawful act" prong of the involuntary manslaughter definition--a *lawful* act which might produce death, done without due caution. By contrast, we are concerned here

with the "unlawful act" prong of that definition--misdemeanor manslaughter, an *unlawful* act. (See § 192, subd. (b).)

Nor does the theory of involuntary manslaughter based on imperfect self-defense work, because that is no longer a viable legal theory on our facts. At the time *Glenn* was decided, a person who killed in imperfect self-defense (i.e., an actual but unreasonable belief in the need to defend) could be found guilty of either voluntary or involuntary manslaughter, depending on whether he acted with an intent to kill. (See *Glenn*, *supra*, 229 Cal.App.3d at p. 1467.) That is no longer the case, because an intent to kill is no longer deemed an essential element of voluntary manslaughter; a conscious disregard for life will suffice. (*People v. Blakeley* (2000) 23 Cal.4th 82, 91.) It is now voluntary, not involuntary, manslaughter "when a defendant, acting with a conscious disregard for life, unintentionally kills in [imperfect] self-defense . . . ." (*Ibid.*; see also *id.* at p. 85.)

We conclude the trial court did not err in failing to instruct on involuntary manslaughter on its own initiative.

**II. Voluntary Intoxication Does Not Negate Implied Malice**

Defendant contends the trial court denied him due process by instructing that voluntary intoxication cannot negate implied malice for purposes of second degree murder. We disagree.

The trial court gave a standard instruction (CALCRIM No. 3426), which stated in part that "[v]oluntary intoxication is not a defense to [s]econd degree murder accomplished by

implied malice [i.e., the mental state of acting with knowledge of danger and conscious disregard for life] . . . ." This instruction is based on section 22, which, after being amended in 1995, currently provides in relevant part:

"(a) No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his or her having been in that condition. Evidence of voluntary intoxication shall not be admitted to negate the capacity to form any mental states for the crimes charged, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act.

"(b) Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored *express* malice aforethought [i.e., the mental state of acting with unlawful intent to kill]." (Italics added.)

Prior to its amendment in 1995, section 22 had been interpreted as permitting a jury to consider evidence of a defendant's voluntary intoxication in determining whether he harbored express *or* implied malice. (See *People v. Whitfield* (1994) 7 Cal.4th 437, 441.) That is no longer the case.

Defendant realizes that section 22 now stands against him. Defendant claims, however, that constitutional due process stands against section 22, because the statute barred the jury

from considering exculpatory evidence whether, due to his intoxication, he did not know that his act was dangerous and he did not have a conscious disregard for life (i.e., the mental state of implied malice).

This same constitutional claim was made and rejected in *People v. Martin* (2000) 78 Cal.App.4th 1107 and *People v. Timms* (2007) 151 Cal.App.4th 1292. We find those two cases persuasive. In a nutshell, as explained in *Timms*: "The absence of implied malice from the exceptions listed in [section 22,] subdivision (b) is itself a [legislative] policy statement that murder under an implied malice theory comes within the general rule of [section 22,] subdivision (a) such that voluntary intoxication can serve no defensive purpose. In other words, section 22, subdivision (b) is not 'merely an evidentiary prescription'; rather, it 'embodies a legislative judgment regarding the circumstances under which individuals may be held criminally responsible for their actions.' [Citation.] In short, voluntary intoxication is irrelevant to proof of the mental state of implied malice . . . . Therefore, it does not lessen the prosecution's burden of proof or prevent a defendant from presenting all relevant defensive evidence [and therefore does not violate due process]." (*Timms*, *supra*, 151 Cal.App.4th at pp. 1300-1301, quoting *Montana v. Egelhoff* (1996) 518 U.S. 37, 57 [135 L.Ed.2d 361, 376-377] [the deciding, conc. opn. of Ginsburg, J., in a plur. court opn.]; see also *Martin*, *supra*, 78 Cal.App.4th at p. 1117.)

The trial court did not err in instructing that voluntary intoxication cannot negate implied malice.

### III. Counsel Was Not Ineffective

Defendant contends his counsel ineffectively represented him by failing to object when the prosecutor improperly defined voluntary manslaughter during closing argument. We disagree.

During closing argument the prosecutor remarked, correctly, that "a murder charge can be reduced to voluntary manslaughter if there's provocation. And if as a result of that [provocation] [defendant] acted rashly and under the influence of intense emotion obscuring his reasoning or judgment. And that provocation has to cause a person of average disposition to act rashly and without due deliberation from passion rather than judgment." These correct remarks tracked the instruction the trial court gave the jury.

Later in the argument, however, the prosecutor went astray: "And then how would . . . a person . . . of . . . average disposition react in the same situation knowing the same facts? . . . [A]re you going to break 10 ribs? Are you going to break the hyoid bone? Are you going to break the orbital? Are you going to break the nose? Are you going to pound on this person's eyes and kill them? Is that what that person of average disposition is going to do under these circumstances? I would submit to you they would not."

Here, the prosecutor crossed the line. Voluntary manslaughter based on provocation (heat of passion) is concerned

essentially about acting with a particular "mindset"; the prosecutor, however, improperly transformed that theory merely into a comparative "act set." (See *People v. Coad* (1986) 181 Cal.App.3d 1094, 1106.)

To show ineffective assistance of counsel, a defendant must show that counsel failed to act as a reasonably competent attorney, and that prejudice resulted (i.e., a reasonable probability that defendant would have fared better had counsel not failed). (*People v. Gates* (1987) 43 Cal.3d 1168, 1183.) Defendant cannot make either showing here.

Defendant cannot meet the first prong--reasonable competence--because, as the People argue, his counsel reasonably may have decided not to object to the prosecutor's challenged remarks. The defense had focused on self-defense (Sullivan's violent character and initial aggression) and on defendant's testimony that, by the time he hit Sullivan, the issue of Sullivan having slept with Cindy had "[a]lready been resolved." To draw attention back to the heat-of-passion theory would have diminished this focus and defendant's credibility.

Nor can defendant meet the second prong--prejudice. As the People again argue persuasively, "it is not reasonably probable the jury would have concluded that an ordinary person of average disposition would have acted rashly and without due deliberation upon hearing that his [short-term] spouse--from whom he had been legally separated for over a year [and that separation occurred not long after marriage], who he was in the process of

divorcing, and who he knew had engaged in relations with three other men during their separation--had been involved with a fourth man as well." Furthermore, the trial court properly instructed the jury on the voluntary manslaughter theory of heat of passion.

Nor is defendant's cumulative error argument any stronger than the three previous contentions of error that comprise its foundation.

## IV. Sufficient Evidence of Great Bodily Injury

Lastly, defendant contends there is insufficient evidence that Cindy's injuries constituted great bodily injury. He is mistaken.

The applicable statute defines "great bodily injury" as a "significant or substantial physical injury." (§ 12022.7, subds. (e), (f).) A jury's finding of "great bodily injury" is upheld if there is sufficient evidence to support it, even if a contrary finding is also reasonable. (*People v. Escobar* (1992) 3 Cal.4th 740, 750.)

The emergency room doctor who treated Cindy after defendant assaulted her testified that she suffered a broken nose, an injury to her left jaw, and bruises to her forehead and left rib cage. Cindy added that she suffered "two broken ribs, a sunken chest cavity, multiple lacerations, and [a] slight concussion." This is sufficient evidence of great bodily injury. (See *People v. Nava* (1989) 207 Cal.App.3d 1490, 1498-1499 [victim's broken nose was not great bodily injury as a matter of law--the trial

court there had instructed it was--although the jury could "very easily" have found such as a matter of fact].)

## V. Section 4019

The recent amendments to section 4019 do not entitle defendant to additional time credits, as he was committed in this case for "serious" felonies. (§ 4019, subds. (b)(1), (2) & (c)(1), (2); Stats. 2009, 3d Ex. Sess., ch. 28, § 50.) The convictions for second degree murder and corporal injury with great bodily injury to Cindy McDonough preclude additional conduct credits. (§ 1192.7, subd. (c)(1), (8).)

## DISPOSITION

The judgment is affirmed.

BUTZ, J.

We concur:

NICHOLSON, Acting P. J.

RAYE, J.